No. 215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

In the Matter of WILLIAM OLIVER,
Petitioner

REPLY BRIEF FOR PETITIONER

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FOREWORD

The State in its brief takes the position that we have improperly framed the questions which this appeal presents. It then attempts to restate these questions. Fortunately in doing so it narrows the issues which are presented to this Court for adjudication.

As a basis for the claim that we have incorrectly stated the first question which our original brief presents the State states that our framing of the question is based upon our erroneously assuming that Oliver was never "in the presence of a court." They say this assumption is wrong because "it is now an established Michigan doctrine that a Circuit Judge who * * * conducts a one-man grand jury inquiry 'is acting in a judicial capacity.'"[1]

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[1] Appellee's brief, p. 6.

The fact that the proceedings in the instant case took place entirely in chambers, and not in open court is not challenged. But the contention is presented that the chambers of an inquisitor is legally an open court because the Michigan Supreme Court has said the inquisitor acts in a judicial capacity. In other words the State seeks to avoid the force of the argument in our original brief on this question, not by challenging our contention as to what due process requires for the punishment of contempts not committed in open court, but by averring that such contention has no application since the contempt actually was committed in open court.

In turn the State challenges the correctness of the statement of our second and third propositions by saying that we erroneously use the term "false" in the place of "evasive" in our statement of these questions.

Further, the State takes the position that the Federal cases upon which we rely have no application to contempts in Michigan Courts.

These contentions we will discuss under separate headings.

WAS OLIVER GUILTY OF CONTEMPT IN OPEN COURT BY REASON OF THE FACT THAT THE MICHIGAN SUPREME COURT HAS STATED THAT A JUDGE ACTING AS A ONE-MAN GRAND JUROR ACTS JUDICIALLY?

This court has had occasion to say:

> "A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authority. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law."[2]

The Michigan Supreme Court in turn has had frequent occasion to define "judicial power" as that term is used in the Michigan Constitution, as "the power to hear and determine controversies between adverse parties and questions in litigation."[3]

It is true, as appellee states, that the Michigan Supreme Court has taken occasion to say that a Circuit Judge acting as inquisitor is acting in a "judicial capacity." But that is an example of the careless use of an indefinite, general term. For "judicial" is a term which has application other than to courts. This court has seen fit to quote the following language:

> "Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties;"[4]

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[2] Todd v. U. S., 158 U. S. 278, 39 L. ed. 982.

[3] Daniels v. People, 6 Mich. 381;
Lloyd v. Wayne Circuit Judge, 56 Mich. 236;
Goetz v. Black, 256 Mich. 565;
In re Sanderson, 289 Mich. 165.

[4] Reetz v. Michigan, 188 U. S. 505; 47 L. ed. 563.

And as said in an early Michigan case, "discretionary and judicial powers are often convertible terms, and there are many acts requiring the exercise of judgment, which may be fairly said to be of a judicial nature, and yet in no sense coming within the judicial power as applicable to courts."[5]

As a result courts frequently employ the term "judicial" in its general sense. Their statements in turn are adopted by other courts in a strict sense. Confusion inevitably follows. An example of this is found in *Cobbledick v. U. S.*, 309 U. S. 323; 84 L. Ed. 783; 60 Sup. Ct. 540. where the dictum appears that "the proceeding before a grand jury constitutes 'a judicial inquiry.'"

The Michigan Supreme Court in *In re Slattery*, 310 Mich. 458, cites the Cobbledick case to justify its statement that an inquisitor acts judicially. Yet whenever the question has been presented, Is a Grand Jury's inquiry a "judicial" one in the sense of an exercise of judicial powers?—the courts have answered in the negative.[6]

To determine whether a person or a body functions as a court or in some other capacity it is not sufficient to consider merely the character of the actor. As this court has said "It is the nature of the final act that determines the nature of the previous inquiry."[7] An inquisitor's final act is the issuance of a warrant. He determines no issue, makes no adjudication. He thus exercises no judicial

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[5] Daniels v. People, 6 Mich. 381, on 390.

[6] Adams v. Indiana, 214 Ind. 602, 17 N. E. 2nd, 84;
State v. Lawler, 221 Wisc. 432, 267 N. W. 65, 105 A. L. R. 568;
Coblenz v. State, 164 Md. 558, 166 A. 45, 88 A. L. R. 886.

[7] Prentiss v. Atlantic Coast Line, 211 U. S. 210, 227; 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67;
Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 298, 307, 58 L. ed. 229, 240.

powers and does not act "judicially" in the strict sense of that term. Therefore his secret sessions possess no characteristic of an open court.

For example, one does not act judicially in taking bail,[8] nor when acting as an examining magistrate,[9] even though he be a judge in fact. And, one need not be a judge to act as an examining magistrate.[10] Nor does a commissioner of the United States Court exercise judicial powers.[11]

It is thus apparent that when the Michigan Supreme Court states an inquisitor's inquiry is a judicial one, it is a loose employment of that term which furnishes no warrant for the assertion that Oliver appeared "in open court" when he was actually present merely in secret chambers.

It should be observed that in determining that a judge acting as an inquisitor is acting judicially, the Michigan Supreme Court is construing the character of an official's action, and is not in any sense construing a statute. This is not therefore a case resting on a State Court's construction of a statute, which is binding upon this court, but is the assertion of a general principle of law, which is not binding on this court.[12]

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[8] Daniels v. People, 6 Mich. 381;
In re Sanderson, 189 Mich. 165.

[9] Daniels v. People, 6 Mich. 381, 388;
Ex Parte Gist, 26 Ala. 156;
State v. Ferguson, 48 S. D. 346.

[10] Ocampo v. U. S., 234 U. S. 91, 58 L. ed. 1231.

[11] Todd v. U. S., 158 U. S. 278, 39 L. ed. 982;
Go-Bart Importing Co. v. U. S., 282 U. S. 344, 75 L. ed. 374.

[12] Town of Venice v. Murdock, 92 U. S. 494, 23 L. ed. 583.

ARE THE DECISIONS OF THIS COURT AS TO WHAT DUE PROCESS REQUIRES IN CONTEMPT CASES APPLICABLE TO THE STATE COURTS?

Commencing upon page 20 of its brief the State presents the argument that the cases of this court upon which we rely are cases construing the Federal contempt statute and therefore do not apply to the Michigan Courts. This position is taken with reference to our contention that even if it be held that Oliver was actually in the presence of a court, he could not be convicted of contempt without a trial of the issue of the falsity of his testimony.

At the outset it should be noted that the Michigan contempt of *court* statutes have been held to be but declaratory of the common law,[13] and the Michigan Supreme Court has consistently held that due process of law ordains that contempts not committed in open court are punishable only after the preferring of charges, a notice of hearing and a trial.[14]

The Michigan General Contempt Statute condemns:

> "1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

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[13] "The Statutes are in affirmation of the common law power of courts to punish for contempts, and, while not attempting to curtail the power, they have regulated the mode of proceeding and prescribed what punishment may be inflicted." Langdon v. Wayne Circuit Judges, 76 Mich. 358, 367.

[14] In re Wood, 82 Mich. 75;
Smilay v. Judge, 235 Mich. 151;
In re Gilliland, 284 Mich. 604, 612;
In re Na Lepa, 298 Mich. 310.

"2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;"

* * * * *

"7. All persons summoned as witnesses for refusal or neglect to obey such summons, or to attend or to be sworn, or when so sworn, to answer any legal and proper interrogatory." [15]

The Federal Statute insofar as it pertains to contempts committed in open court is fully consonant with that of the Michigan Statute. The Federal Statute provides that the power of Federal Courts to punish for contempt "shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of said courts,"[16] The distinction between the Federal and Michigan statutes, as to offenses committed in open court is this; the Federal Statute renders any "misbehaviour" in open court punishable whereas the Michigan Statute specifies what particular misbehaviours shall be punishable. In other words the Federal Statute leaves "misbehaviour" to its definitions at common law, which the Michigan Statute (held to be declaratory of the common law) gives express common-law definitions of punishable "misbehaviour."

The curtailment by Congress of the Federal Courts' power to punish for contempt applies only to contempts committed *not in the presence of the court*, and it is only as to such contempts that the Federal Statute differs from the Michigan Statute.

It will thus be seen that the difference in the Federal and State contempt powers has no application to our proposition that, even though the inquisitor be deemed to be holding court, he may not punish summarily because he deems the testimony of a witness false.

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[15] Sec. 13910, C. L. 29; Sec. 28.511 M. S. A.

[16] 28 U. S. C. A. 385.

Thus in the Hudgings[17] case the alleged false swearing which it was sought to punish for contempt was commited in open court. It it were contemptuous "misbehaviour," it was punishable forthwith even under the Federal Statute. But this Court rules that mere false testimony is not in and of itself contemptuous misbehaviour, and that before it can be held to constitute contempt it must appear that it have a tendency to obstruct the administration of justice.

This language "obstruct the administration of justice" is no part of the Federal Statute insofar as it relates to contempts in open court. Rather, it is language that has long been accepted as defining the kind of misbehaviour in open court which is punishable as contempt. As early as 1883, we find precisely that language used by an English author in defining contempts, and it may well be that the language of this court in the Hudgings case was adopted from the author.[18]

The matter was clarified by the decision in *Matter of Michael,* 326 U. S. 224, 90 L. Ed. 30. In that case there was no question of a full hearing on the contempt charge. After a full hearing, Michael was adjudged guilty of having testified falsely before a grand jury and upon that basis was adjudged guilty of contempt. This court says:

> "Our question is whether it was proper for the District Court to make its finding on that issue (the falsity of his answers) the crucial element in determining its power to try and convict petitioner for contempt."

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[17] Ex Parte Hudgings, 249 U. S. 378, 632 L. ed. 656, 30 Sup. Ct. 337.

[18] Sir John Fox, in his History of Contempt of Court, in his analysis of Lord Selborn's Classification of Contempts in 1883, includes any stranger to the pending suit "who was guilty of an offense which obstructs or tends to obstruct the administration of justice." (Page 44—1927 Edition.)

This court then points out that even though false testimony tends to defeat the ultimate objective of the trial, it need not necessarily obstruct or thwart the judicial process, since it is the function of the court to hear truthful and false witnesses. And this Court continues:

> "It is in this sense, doubtless, that this court spoke when it decided that perjury alone does not constitute an 'obstruction' which justifies exertion of the contempt power and that there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty.' "

WAS OLIVER GUILTY OF EVASIVE AND NOT FALSE ANSWERS?

The State's brief seeks to create a distinction between liability for contempt for false answers and liability for contempt for evasive answers. But this is a distinction which the record does not permit. For in this case there was no parrying of questions. In every instance there was a direct answer. If the answers were truthful, there was no evasion. If they were false, evasion may be said to have been practiced. It is a case where the evasiveness of the answers depends upon their falsity. There is therefore no room to claim the answers were evasive but not false, or that Oliver was guilty of contempt because of evasive answers and not because of false answers.

The language of the judge in passing condemnation upon petitioner makes it clear that his condemnation was based upon the opinion that the testimony was false. He stated:

> "Q. Because the story doesn't, if you want it put in language you understand, doesn't jell, and we believe that, I think we all believe, that I believe that, and Judge Holland here, he is my associate, although

I am technically the Grand Juror, we more or less like to have in cases of this kind, at least the advice of other reasonable persons to see whether or not we are jumping at wild conclusions, I don't think any one person who reads your testimony, reads this record, could believe this story" (R. 14).

CONCLUSION

The State's brief states with commendable frankness that "no informed person would assert that a constructive contempt committed entirely outside the precincts of a court may be punished summarily without notice or hearing."[19] They strive to defeat that principle in the instant case by arguing that an inquisitor's secret chambers (which are often a secret hideout far removed from the Court Building) are in legal contemplation an open court.

This contention is illustrative of the violence to legal principles which characterizes much of the activities of Michigan inquisitors. If it be true that the Michigan Supreme Court has persuaded itself to such a conclusion, we can understand how it can rule, as it has in this and other cases, that the appeal of an alleged contemnor should be judged, not on the full record, but on such a record as his prosecutor chooses to return.[20] Thus petitioner has had the remarkable experience of having been adjudged guilty of contempt of court after no hearing in the Circuit Court and of them being denied a full hearing in the Michigan Supreme Court.

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[19] Appellee's Brief, p. 16.

[20] c. f. In re Slattery, 310 Mich. 458, as well as the instant case.

This Court should find genuine satisfaction in remedying such a situation.

Respectfully submitted,

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